No. 88-2128

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

MINORITY EMPLOYEES OF THE TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, INC., ROSETTA N. DAVIS, ALMA C. OLIVER AND HAZEL PERRY,

Petitioners,

v.

STATE OF TENNESSEE, DEPARTMENT OF EMPLOYMENT SECURITY, ROBERT J. BIBLE, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF EMPLOYMENT OF SECURITY, TENNESSEE DEPARTMENT OF PERSONNEL, WILLIAM C. KOCH, JR., COMMISSIONER OF PERSONNEL OF THE STATE OF TENNESSEE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Do the terms "Minority Employees of the Tennessee Department of Employment Security, Inc. et al." and/or "Plaintiffs in the above action" fail to satisfy the specificity requirement of Rule 3(c) of the Federal Rules of Appellate Procedure as to the petitioners, Rosetta N. Davis, Alma C. Oliver and Hazel Perry, resulting in no federal appellate jurisdiction over their claims?

PARTIES TO THE PROCEEDINGS BELOW

The petitioners in this action are Rosetta N. Davis, Alma C. Oliver and Hazel Perry. Minority Employees of the Tennessee Department of Employment Security, Inc. is a party to the proceeding before the United States Court of Appeals for the Sixth Circuit; however it is not a party to this Petition for Writ of Certiorari.[1] The respondents in this action are the Tennessee Department of Employment Security, Robert J. Bible, Commissioner of the Tennessee Department of Employment Security, Tennessee Department of Personnel and William C. Koch, Jr., Commissioner of the Tennessee Department of Personnel.

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[1] The United States Court of Appeals for the Sixth Circuit granted the respondents' Motion to Dismiss the petitioners, Rosetta N. Davis, Alma C. Oliver and Hazel Perry from the appeal for failure to specify the names of those individuals in the Notice of Appeal; however, since Minority Employees of the Tennessee Department of Employment Security, Inc., was designated as a party in the Notice of Appeal, the respondents filed no motion to dismiss as to Minority Employees of the Tennessee Department of Employment Security, Inc.

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's orders of February 28, 1989 and October 7, 1988 in this case. Those orders are not reported but are set forth at pages 1a-4a of the Appendix of the Petition for Writ of Certiorari.

JURISDICTION

The petitioners assert that this Court has jurisdiction to consider their Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1291. That particular statutory provision vests jurisdiction with courts of appeals to hear final decisions from district courts not jurisdiction for this Court to consider a petition for writ of certiorari from a court of appeal. Jurisdiction for this Court to consider a petition for writ of certiorari is pursuant to 28 U.S.C. § 1254(1) which provides that this Court may review cases in the federal courts of appeals by "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

PERTINENT RULES AND STATUTES

Rule 3(c) of the Federal Rules of Appellate Procedure:

> The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

28 U.S.C. § 1653:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

REASONS FOR DENYING THE WRIT

I.

THE ORDERS OF THE SIXTH CIRCUIT DATED FEBRUARY 28, 1989 AND OCTOBER 7, 1988 ARE IN ACCORD WITH THIS COURT'S DECISION IN THE *TORRES* CASE

In *Torres v. Oakland Scavenger Company*, 108 S.Ct. 2405 (1988), this Court was confronted with the question of "whether a federal appellate court has jurisdiction over a party who was not specified in the notice of appeal in accordance with Federal Rule of Appellate Procedure 3(c)." In that case, the petitioner, Jose Torres, was one of sixteen plaintiffs who had intervened in an employment discrimination suit in the United States district court for the district of California. Due to a "clerical error on the part of a secretary employed by the petitioner's attorney", Mr. Torres' name was left off the notice of appeal. *Id.* at 2407. In upholding the Ninth Circuit's dismissal of Mr. Torres' appeal for lack of jurisdiction under Rule 3(c), Justice Marshall, writing for the majority, stated as follows:

> [W]e find that the petitioner failed to comply with the specificity requirement of Rule 3(c), even liberally construed. Petitioner did not file the functional equivalent of a notice of appeal; he was never named or otherwise designated, however inartfully, in the notice of appeal filed by the 15 other intervenors. Nor did petitioner seek leave to amend the notice of appeal within the time limits set by Rule 4. Thus, the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal.

Id. at 2409.

In response to the petitioner's argument that the use of the term "et al." was sufficient to indicate his intention to appeal, this Court stated that:

> The use of the phrase 'et al.', which literally means 'and others', utterly fails to provide such notice to either intended recipient. Permitting such vague designation would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions. The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.

Id.

As in the *Torres* case, the petitioners, Rosetta N. Davis, Alma C. Oliver and Hazel Perry failed to be designated in the notice of appeal either in the caption or the body. Such a failure results in a lack of jurisdiction which the Sixth Circuit recognized in its order of October 7, 1988, stating that "[b]ecause plaintiffs Davis, Oliver and Perry are not designated in the notice of appeal as required by *Torres*, it is ordered that the motion to dismiss is granted." Petition for Writ of Certiorari, Appendix 4a.

The petitioners argue that the use of the phrase "otherwise designated" by this Court in the *Torres* opinion should open the door for the Sixth Circuit to make an inquiry as to whether the petitioners, Rosetta N. Davis, Alma C. Oliver and Hazel Perry were "otherwise designated" in the notice of appeal. The problem with this argument is that a review of the notice of appeal supports the decision of the Sixth Circuit to dismiss the petitioners' appeal. The pertinent language of the notice of appeal is

twofold. First, the caption states "Minority Employees of the Tennessee Department of Employment Security, Inc., et al.". Second, the body of the notice of appeal states "[n]ow come plaintiffs in the above case and appeal . . . ."

Whether taken separately or together, the language in these two pertinent portions of the notice of appeal in no way designates the petitioners, Rosetta N. Davis, Alma C. Oliver and/or Hazel Perry as appealing the district court decision. This Court in the *Torres* decision rejected the argument that the term "et al." was sufficient to designate Mr. Torres as an appellant. Likewise, the term "et al." is insufficient to designate the petitioners, Rosetta N. Davis, Alma C. Oliver and Hazel Perry as appellants from the district court to the court of appeals. As for the use of the term "plaintiffs" in the body of the notice of appeal, it is impossible to know which of the "plaintiffs" are being designated as appellants, especially in light of the fact that there are a total of four plaintiffs.

As for the petitioners' argument that the Sixth Circuit erred in not permitting them to amend their notice of appeal pursuant to 28 U.S.C. § 1653, such an argument fails due to the fact that the petitioners attempted to make such an amendment after the time for taking the appeal had expired. This Court in *Torres* noted that the petitioner did not "seek leave to amend the notice of appeal within the time limits set by Rule 4." *Torres*, 108 S.Ct. at 2409. Likewise, the petitioners' failure to amend their notice of appeal within the time prescribed results in the Sixth Circuit not having jurisdiction over that appeal.

II.

THE ORDERS OF THE SIXTH CIRCUIT DATED FEBRUARY 28, 1989 AND OCTOBER 7, 1988 ARE CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS RENDERED AFTER THIS COURT'S OPINION IN THE *TORRES* CASE

Subsequent to this Court's decision in the *Torres* case, a number of other circuits have rendered decisions which are in agreement that use of the term "et al." is insufficient to name or otherwise designate a party for purposes of a notice of appeal under Rule 3(c) of the Federal Rules of Appellate Procedure. *See Santos-Martinez v. Soto-Santiago*, 863 F.2d 174 (1st Cir. 1988) (the use of the phrase "et al." in the caption of the present appeal is inadequate to specify the plaintiffs who are actually appealing.); *Appeal of District of Columbia Nurses' Association*, 854 F.2d 1448 (D.C. Cir. 1988) (court lacks jurisdiction to entertain appeal from unnamed appellants based on the use of the term "et al."); and *Meehan v. County of Los Angeles*, 856 F.2d 102 (9th Cir. 1988) (the use of "et al." following Brian Meehan's name and notice of appeal does not sufficiently indicate an intention to appeal by Michael Meehan or Keith Mauldin).

The petitioners argue that the orders of the Sixth Circuit dated February 28, 1989 and October 7, 1988 are in conflict with the decision of another panel of the Sixth Circuit in the case of *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989). An internal conflict of decisions within a circuit is

not a ground for this Court to grant a petition for writ of certiorari.[2]

Although this Court has discretion to grant a petition for writ of certiorari from an interlocutory order as in this case, this Court has indicated that it "should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Company v. Jacksonville T. & K. Western Railroad Company,* 148 U.S. 372, 384 (1893). *See also Supreme Court Practice,* Stern, Gressman & Shapiro, § 4.18 (6th Ed. 1985). There is no extraordinary reason why this Court should grant this petition from an interlocutory order.

Finally, the respondents note that the Sixth Circuit rendered a final decision in this case on July 10, 1989 after the petitioners filed this petition for writ of certiorari. Moreover, the petitioners filed a petition for rehearing en banc[3] with the Sixth Circuit on July 21, 1989 raising the following issue before the en banc panel:

> Whether the panel erred in dismissing an appeal as to three of the four plaintiffs despite prevailing principles of liberal construction, the express provision of Rule 3(c), Federal Rules of Appellate Procedure which mandates '[a]n appeal shall not be

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[2] Rule 17 of the Supreme Court Rules sets forth the grounds to which this Court will look in granting a petition which include a conflict among the circuits and a question of federal law which has not been but should be settled by this court.

[3] The respondents have lodged a copy of the petition for rehearing en banc with the Clerk of the Supreme Court for the Court's convenience.

dismissed for informality of form or title of the notice of appeal', where the joint notice of appeal identified the Appellants as 'plaintiffs in the above case,' contained the typed name of one plaintiff followed by the phrase 'et al.' in the caption and made it clear that all the plaintiffs were appealing, and the panel reached the restrictive and erroneous conclusion that the designations 'plaintiffs in the above case' and 'et al.' in the notice of appeal actually mean only one plaintiff where this Court has issued a directly contrary ruling in the *Nicks* case.

The petitioners are now raising the same issue in their petition for rehearing en banc before the Sixth Circuit as they raise before this Court in their petition for writ of certiorari. Thus, the petition for writ of certiorari is premature and should be denied.

CONCLUSION

Based upon the foregoing authorities and analyses, the respondents respectfully urge this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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